Supreme Court of the United States

OCTOBER TERM, 1923.

No. 132.

UNITED STATES OF AMERICA ex rel. CATONI TISI,
Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York,
Respondent.

REPLY BRIEF FOR APPELLANT.

The respondent's brief points to no scrap of evidence in the record which would support an inference that Tisi had knowedge of the seditious character of any of the literature seized at Baldassarre's house.

We agree that knowledge must generally be proven, if at all, by circumstantial evidence. But when circumstances are as consistent with one thing as with another—as consistent with ignorance as with knowledge—they are not evidence of either. Such circumstances are not circumstantial evidence. They are simply ambiguous circumstances.

Upon a showing of ambiguous circumstances the scale stands delicately balanced. A light weight will turn it. The somewhat general human propensity to believe the worst is not such a weight. Unless a real weight, however light, does in fact turn the scale, the circumstances remain simply ambiguous and do not become evidential.

A man who finds himself in ambiguous circumstances will naturally explain. But where, as here, the circumstances are as open to an innocent as to a guilty interpretation, it may be doubted whether his omission to explain would alone be sufficient to raise inference against him. Tisi, however, explained and his explanation was entirely credible and reasonable. He went to Baldassarre's house to collect a debt. Since there was wine and company, he stayed for awhile to discuss his business and what the interpreter called "daily occurrences" (p. 12). He could not read the English circulars and naturally no one informed him that they were seditious. As he was a mere by-stander, not a participant in folding circulars, it would have been none of his business to inquire about them.

The fact that his explanation was in one particular contradicted by the police witnesses in no wise supplies the want of some affirmative indication that he had knowledge of the nature of the circulars. His explanation was so entirely credible, and the contradiction so incredible, that it is difficult to assume, even for the sake of argument, that the contradiction can affect the construction of the record. When he said that he was standing and on the point of taking his leave at the moment of police entrance, he could not have known that the police witnesses would swear that he was seated at the table folding circulars. If in fact he had been

seated in the presence of four witnesses who were to follow him, and if he was engaged in deliberate perjury for self-exculpation,* he would have worked out an explanation consistent with his being seated.

But even if the testimony of the policemen controls the construction of the record, that testimony goes only to a collateral point. The situation is unlike that in *Lewis v. Frick*, 233 U. S. 291, 299, where rejection of the alien's explanation left no alternative to the finding of his guilt. The Secretary of Labor might disbelieve Tisi and believe the testimony of the police witnesses that he was found in the act of folding circulars, and there would still be no evidence that he knew the nature of the circulars. It would have been entirely natural for Tisi, a temporary participant in a convivial gathering, to join in any manual occupation in which the rest of the company were engaged. Knowing no English, he could not have ascertained for himself that the circulars were seditious. Those who knew it would have been careful not to tell him. The testimony of the police witnesses, therefore, taken at its maximum face value, leaves the ambiguous circumstances as consistent with Tisi's ignorance of the character of the selected circulars as with knowledge.

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* If there was flagrant perjury in the record, it was by the police witnesses. They variously estimated their period of observation at one second (p. 20), 15 or 20 seconds (p. 30), and 30 seconds (p. 23)—not as "a minute or two" as stated on page 2 of the respondent's brief. They denied notwithstanding that they had observed each of the eleven men in personal contact with one or the other (though not specifically with either) of two named circulars selected for seditiousness from a table a foot deep with papers of diverse character.

Were it material, and the openness of the point in this Court less doubtful, it might be strongly urged that no election upon this record to disbelieve Tisi and believe the police witnesses would be so flagrantly inconsistent with the principles of justice as to vitiate the departmental proceeding.

The respondent's brief advances the proposition that knowledge may be inferred from circumstances in which a man would naturally be upon his inquiry, provided he had ability and opportunity to know. This we do not dispute. It has, however, no application here. If Tisi's own testimony was true and he took no part in the folding of circulars, he was not upon inquiry as to their character. Inquiry would have been an impertinence.

And if the police testimony was true, and he did take part in folding circulars, it may still be questioned to what extent the circumstances, which included the circulation of wine, were calculated to put Tisi upon inquiry. Assume, however, that he would naturally have investigated. What showing was there of his ability or opportunity to learn?

He is an Italian shoemaker who had been refused naturalization on account of his ignorance of English (Record, p. 14). It is of common knowledge that Italians of this class live in communities of their own kind, acquiring from the English language, if anything at all, only the simplest phrases of salutation and barter. Irrespective of Tisi's testimony that he knew no English, there could be no affirmative inference to the contrary. He could not have learned the character of the circulars by inspection of them.

Nor can it be inferred that he could have learned their character by inquiry. The only persons of whom he could have inquired were engaged in acts of which they stood in danger of prosecution and punishment under the laws of Pennsylvania. Unless they had reason to trust him as a sympathizer, which there is no ground to suppose, they would not have imperilled themselves and their enterprise by telling him the true character of the circulars.

Assume that the Secretary of Labor might reject the testimony of Tisi and accept entirely that of the police officers. But that (paraphrasing the language of Judge Thompson in *United States ex rel. Kasparian* v. *Hughes,* 278 Fed. 262, p. 11 of our main brief) would leave the case with the mere negative fact of manual possession together with the additional fact that the relator was an Italian, whose statement is was necessary to take through an Italian interpreter.

As the departmental warrant was not based upon evidence the writ of habeas corpus should have been sustained.

Dated, November , 1923.

Respectfully submitted,

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